Supreme Court, U.S.
FILED
JUL 21 2005
OFFICE OF THE CLERK

No. 04-928

In the Supreme Court of the United States

STATE OF OREGON,

Petitioner,

v.

RANDY LEE GUZEK,

Respondent.

Petition for Writ of Certiorari to the Oregon Supreme Court

BRIEF FOR PETITIONER STATE OF OREGON

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
***MARY H. WILLIAMS**
Solicitor General
400 Justice Building
Salem, Oregon 97301-4096
Phone: (503) 378-4402
Counsel for Petitioner

*Counsel of Record

QUESTION PRESENTED

In *Franklin v. Lynaugh*, this Court concluded that a capital defendant does not have a constitutional right to an instruction telling the jury in the penalty phase to consider "residual doubt" about defendant's guilt. Most state and federal appellate courts have relied on *Franklin* to conclude that a capital defendant has no constitutional right to offer evidence and argue in a penalty-phase proceeding that he should receive a sentence less than death because he continues to assert his innocence of the underlying crime. The Oregon Supreme Court, however, held in this case that a capital defendant has a federal constitutional right to present in a penalty-phase proceeding alibi evidence that casts doubt on his guilt. The question presented is:

Does a capital defendant have a right under the Eighth and Fourteenth Amendments to the United States Constitution to offer evidence and argument in support of a residual-doubt claim—that is, that the jury in a penalty-phase proceeding should consider doubt about the defendant's guilt in deciding whether to impose the death penalty?

TABLE OF CONTENTS

Opinion Below 1

Jurisdiction 1

Constitutional Provision Involved 1

Statement of the Case 1

Summary of Argument 10

Argument 13

I. Under Oregon law, the trial court correctly rejected defendant's alibi evidence and argument because it was irrelevant to the sentencing determination. 14

II. The Eighth Amendment requires the sentencer to assess the defendant's character and background and the circumstances of the offense. Evidence that is constitutionally relevant to this assessment must relate to the defendant's moral culpability, not to the defendant's legal culpability. 20

III. *Franklin*'s residual-doubt discussion makes it clear that evidence challenging guilt cannot constitute evidence of the "circumstances of the offense" for purposes of the Eighth Amendment. 27

IV. The Oregon Supreme Court's holding goes well beyond the Eighth Amendment requirement that sentencing juries consider the circumstances of the offense as part of the individualized determination whether death is the appropriate sentence. 34

V. This Court should reject the Oregon Supreme Court's holding that the Eighth Amendment gives a capital defendant the right to present evidence and argument at sentencing that would call into question the defendant's guilt. 44

Conclusion 50

Appendix
Statutes and Rules App-1

Joint Appendix (bound separately)

TABLE OF AUTHORITIES

Cases Cited

Bell v. Ohio,
438 U.S. 637 (1978) 27, 35-43

Blystone v. Pennsylvania,
494 U.S. 299 (1990) 28

Buchanan v. Angelone,
522 U.S. 269 (1998) 25

Buford v. State,
403 So. 2d 943 (Fla. 1981),
cert. den. 454 U.S. 1163 (1982) 46

California v. Brown,
479 U.S. 538 (1987) 23

Eddings v. Oklahoma,
455 U.S. 104 (1982) 10, 22, 23, 26, 28, 42, 43

Evans v. State,
112 Nev. 1172, 926 P.2d 265 (1996),
cert. den. 520 U.S. 1245 (1997) 17

Franklin v. Lynaugh,
487 U.S. 164,
reh'g den., 487 U.S. 1263 (1988) 12, 25, 27, 29, 30,
..... 33-35, 42, 43, 47-49

Furman v. Georgia,
408 U.S. 238 (*per curiam*),
reh'g den. 409 U.S. 902 (1972) 20

Graham v. Collins,
506 U.S. 461,
reh'g den. 507 U.S. 968 (1993) 26

Green v. Georgia,
442 U.S. 95 (1979) 35, 36, 38-43

Green v. State,
242 Ga. 261, 249 S.E.2d (1978) 39, 40, 41

Gregg v. Georgia,
428 U.S. 153,
reh'g den. 429 U.S. 875 (1976) 20, 39

Hitchcock v. Dugger,
481 U.S. 393 (1987) 23, 28

Holland v. State,
705 So. 2d 307 (Miss. 1997),
cert. den. 525 U.S. 829 (1998) 17, 48

Johnson v. Texas,
509 U.S. 350,
reh'g den. 509 U.S. 941 (1993) 25

Lockett v. Ohio,
438 U.S. 586 (1978) 10, 22, 23, 27, 28, 35-43, 45

Lockhart v. McCree,
476 U.S. 162 (1986) 30

McKoy v. North Carolina,
494 U.S. 433 (1990) 20

Payne v. Tennessee,
501 U.S. 808,
reh'g den., 501 U.S. 1277 (1991) 4, 28

Penry v. Lynaugh,
492 U.S. 302 (1989) 4, 23, 25, 34

People v. Emerson,
189 Ill.2d 436, 727 N.E.2d 302,
cert. den. 531 U.S. 930 (2000) 17

Proffitt v. Florida,
428 U.S. 242,
reh'g den. 429 U.S. 875 (1976) 20

Sawyer v. Whitley,
505 U.S. 333,
reh'g den. 505 U.S. 1244 (1992) 19

Schlup v. Delo,
513 U.S. 298 (1995) 19

Skipper v. South Carolina,
476 U.S. 1 (1986) 25, 28

State v. Biegenwald,
106 N.J. 13, 524 A.2d 130 (1987) 18

State v. Boots,
315 Or. 572, 848 P.2d 76,
cert. den. 510 U.S. 1013 (1993) 16

State v. Fletcher,
354 N.C. 455, 555 S.E.2d 534 (2001),
cert. den. 537 U.S. 846 (2002) 39

State v. Green,
271 Or. 153, 531 P.2d 245 (1975) 16

State v. Guzek,
310 Or. 299, 797 P.2d 1031 (1990) 2, 4, 45

State v. Guzek,
322 Or. 245, 906 P.2d 272 (1995) 5

State v. Guzek,
336 Or. 424, 86 P.3d 1106 (2004),
cert. granted,
543 U.S. ___, 125 S. Ct. 1929 (2005) .. 1, 6, 21, 27, 34, 35, 37-39, 41, 42, 44, 47

State v. McGuire,
80 Ohio St. 3d 390,
686 N.E.2d 1112 (Ohio 1997) 18, 46

State v. Moen,
309 Or. 45, 786 P.2d 111 (1990) 15

State v. Pratt,
316 Or. 561, 853 P.2d 827,
cert. den. 510 U.S. 969 (1993) 16

State v. Smith,
190 Or. App. 576, 80 P.3d 145 (2003) (en banc),
rev. allowed, 337 Or. 160 (2004) 16

State v. Wagner,
309 Or. 5, 786 P.2d 93,
cert. den. 498 U.S. 879 (1990) 15

State v. Walls,
342 N.C. 1, 463 S.E.2d 738 (1995),
cert. den. 517 U.S. 1197 (1996) 18

Stockton v. Commonwealth,
241 Va. 192, 402 S.E.2d 196,
cert. den. 502 U.S. 902 (1991) 18

Sumner v. Shuman,
483 U.S. 66 (1987) 29

Tuilaepa v. California,
512 U.S. 967 (1994) 25, 28

Way v. State,
760 So. 2d 903 (Fla. 2000),
cert. den. 531 U.S. 1155 (2001) 17

Woodson v. North Carolina,
428 U.S. 280 (1976) 21, 22, 23

Constitutional and Statutory Provisions

28 U.S.C. § 1257(a) 1

Or. Const. Art. V, § 14 19

Or. Rev. Stat. § 135.455 6

Or. Rev. Stat. § 136.535 19

Or. Rev. Stat. § 163.150 ..... 8, 10, 15, 34

Or. Rev. Stat. §§ 144.649-144.670 19

Or. Rule Civ. Proc. 64 B(4) 19

U.S. Const. amend VIII ..... *passim*

U.S. Const. amend. XIV 1, 9

Other Authorities

Crocker,
Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases,
66 Fordham L. Rev. 21 (1997) 24

Treadway,
Note: *"Residual Doubt" in Capital Sentencing: No Doubt it Is an Appropriate Mitigating Factor*,
43 Case W. Res. L. Rev. 215 (1992) 49

OPINION BELOW

The opinion of the Oregon Supreme Court (Pet. App. 1-86) is reported at *State v. Guzek*, 336 Or. 424, 86 P.3d 1106 (2004), *cert. granted*, 543 U.S. ___, 125 S. Ct. 1929 (2005). The order of the court denying defendant's petition for reconsideration (Pet. App. 87) is not reported.

JURISDICTION

The opinion of the Oregon Supreme Court was issued on March 4, 2004, and the court's order denying defendant's petition for reconsideration was dated and filed on September 8, 2004. The petition for writ of certiorari was filed on January 5, 2005, within the time granted by the extension of time allowed by Justice O'Connor on November 26, 2004. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

This capital case came before the Oregon Supreme Court three times on automatic and direct review of judgments that imposed a sentence of death for aggravated murder. Following the initial trial and sentencing proceeding, the Oregon Supreme Court affirmed defendant's

conviction of two counts of aggravated murder, *State v. Guzek*, 310 Or. 299, 304, 797 P.2d 1031, 1034 (1990) (*Guzek I*). The following description of the murder is taken from the Oregon Supreme Court's opinion:

> The facts surrounding this vicious crime can be stated briefly. Defendant, who was 18 years old at the time of the offense, had dated a high school acquaintance during the 1986-87 school year. The high school acquaintance at the time lived with her uncle and aunt, Rod and Lois Houser, at Terrebonne, a rural community in Deschutes County. Rod Houser disapproved of defendant; Houser's niece broke off the relationship. The parting was not amicable; defendant resented both the niece and her uncle.
>
> On Sunday, June 28, 1987, defendant met with two friends, Mark Wilson and Ross Cathey. The three men planned to burglarize a rural Deschutes County home where they believed a large amount of jewelry was kept. Defendant, who was the leader and planner in the group, instructed Cathey to cut the throat of their prospective victim with a knife that defendant supplied. Cathey agreed. That plan failed, however, when there turned out to be too many lights and too many cars at the targeted residence when the conspirators arrived.
>
> Thwarted, the three men started to drive back toward Redmond, the nearest town. They were continuing to look for a house to burglarize. Cathey suggested the Houser residence, which he and Wilson had remarked upon earlier that day as a possible tar-

get for a burglary. All three agreed on this alternate target.

The three returned to the home in Redmond that defendant shared with his father. There, defendant secured two guns (a .22 rifle and a .32 pistol) to be used in robbing the Housers. The three then departed for the Housers'. On the way, they stopped at a secluded spot and defendant test fired the rifle, showing Wilson how to clear the action of the weapon if it jammed. The journey resumed.

Somewhere during the drive it seems to have been settled that, if the Housers proved to be home when the three arrived, the couple would be killed. The Housers were at home.[1] Defendant rang the doorbell and pounded on the door until Rod Houser finally answered it. A short, hostile discussion between defendant and Rod Houser ensued. Defendant then yelled "Do it!" to Wilson, who began firing the .22 at Rod Houser. Rod Houser retreated into the house, where he was felled by a fatal fusillade from the .22. Defendant ran upstairs and shot Lois Houser three times with the .32 pistol, killing her.

The men then ransacked the Houser residence, taking a great deal of personal property, including a ring that defendant pulled from Lois Houser's finger after he had murdered her. The men took the property to Redmond and stored it in various locations through the help of defendant's father.

The Housers' bodies were discovered two days after the murders. Suspicion came to center on defendant and Wilson, due to the enmity between defen-

dant and the Housers. Eventually, police arrested defendant, Wilson, and Cathey. Wilson and Cathey confessed, implicating defendant. Both men testified against defendant at his trial. The state permitted each to plead guilty to a reduced charge in return for his testimony. A jury convicted defendant of both murders.

---

[1] The niece was not there.

Guzek I, 310 Or. at 301-302, 797 P.2d at 1032.

Oregon's death penalty statute at the time of the first trial did not require the trial court to instruct the penalty-phase jury to consider all mitigating circumstances when deciding whether the defendant should receive a death sentence, and the trial court did not give a mitigation instruction. On direct review, the Oregon Supreme Court affirmed the convictions, but reversed defendant's sentence of death in light of *Penry v. Lynaugh*, 492 U.S. 302 (1989), holding that the Eighth Amendment requires a penalty-phase jury to be able to consider and give effect to all relevant mitigating evidence. *Guzek I*, 310 Or. at 305-306, 797 P.2d at 1034.

In the second sentencing proceeding, a new jury again imposed the death penalty. On direct review, the Oregon Supreme Court reversed on the ground that the trial court erroneously had admitted victim-impact evidence against defendant, based on *Payne v. Tennessee*, 501 U.S. 808, *reh'g den.*, 501 U.S. 1277 (1991). The Oregon Supreme Court agreed with defendant that the victim-impact evidence was not relevant to any of the questions that the

jury was required to consider under Oregon's statutory scheme. The court remanded the case for a third penalty-phase proceeding. *State v. Guzek*, 322 Or. 245, 270-71, 906 P.2d 272, 287 (1995) (*Guzek II*).

A new jury again imposed the death penalty and the case came before the Oregon Supreme Court for a third time. The State conceded that error in this third penalty-phase proceeding once again required a reversal and remand for another penalty-phase proceeding.[1] The Oregon Supreme Court agreed with the State's concession, vacated defendant's death sentence, and remanded for a fourth penalty-phase proceeding.[2] *State v. Guzek*, 336 Or.

---

[1] The problem in the third penalty-phase proceeding related to the trial court's refusal to instruct the jury about the true-life sentencing option, an option not available at the time of the crime, but available at the time of the sentencing proceeding. At the time of the third penalty-phase proceeding, the Oregon Supreme Court had ruled that retroactive application of the true-life sentencing option violated the state and federal prohibitions against *ex post facto* laws. Guzek waived all *ex post facto* challenges, but the trial court concluded that the true-life option nonetheless was not available to him. Subsequent to the third penalty-phase proceeding, the Oregon Supreme Court ruled in a different case that refusing to instruct a jury about the true-life sentencing option in these circumstances was reversible error. *State v. McDonnell*, 329 Or. 375, 388-89, 987 P.2d 486, 494 (1999). In light of that holding, the State conceded that the trial court's failure to instruct the jury on the true-life sentencing option in this case required reversal and remand for a fourth penalty-phase proceeding.

[2] As the State explained in its petition for writ of certiorari, the need for further proceedings does not deprive this

424, 86 P.3d 1106 (2004) (*Guzek III*), Pet. App. 11-13. The court then addressed some of the remaining issues defendant had raised on appeal, which are likely to arise on remand. Pet. App. 13. Among those issues was the trial court's refusal to permit defendant to introduce as mitigation evidence certain alibi evidence that would, if believed, show he was not present when the murders occurred.

Defendant described that evidence when he filed a Notice of Intent to Rely on Evidence of Alibi as Mitigating Evidence.[3] J.A. 94. Defendant alerted the State that he would offer the following alibi evidence:

Court of jurisdiction over this federal issue. It falls within the third category of cases described in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975), because "later review of the federal issue cannot be had, whatever the ultimate outcome of the case" on remand. *See also Florida v. Thomas*, 532 U.S. 774 (2001) (application of the four *Cox* categories).

No matter the outcome of the fourth penalty-phase proceeding in this case, the State will be precluded from appealing any trial court ruling that complies with the Oregon Supreme Court decision by admitting alibi evidence offered as mitigation evidence. If defendant is again sentenced to death, the issue will be moot. If he is sentenced to something less than death, the issue will be unappealable because of double-jeopardy principles. Either way, the state cannot get review of this federal issue unless this Court addresses it now.

[3] Oregon law requires the defendant to file a written notice of intent to rely on alibi evidence at trial. Or. Rev. Stat. § 135.455. App. 1.

> 1. The prior court testimony of Clarence Guzek, [defendant's grandfather,] since deceased, will be offered to prove that on June 28, 1987 from approximately 9:00 pm until June 29, 1987 at approximately 2:00 am Randy Guzek was in the presence of and at the home of Clarence Guzek on Walnut Street in Redmond, Oregon.
>
> 2. The testimony of Kathleen Guzek[, defendant's mother,] will be offered to prove that on June 29, 1987 she noted that at 2:16 am defendant asked her to set the alarm clock as he had to get up early for work the next day. The location of this conversation was at her residence on Walnut Street in Redmond, Oregon. She will further testify that when the alarm woke her at 4:20 am on June 29, 1987 she woke the defendant who was sleeping on a love seat on the deck of her house.

Id. If believed, this evidence would place defendant somewhere other than the victims' home at the time of the murder. The evidence would be contrary to defendant's convictions for murdering the Housers.

The trial court excluded the alibi evidence, apparently on relevance grounds.[4] Defendant argued on direct and

---

[4] The limited discussion in the trial court is set out in the Joint Appendix. J.A. 80-93. The Oregon Supreme Court noted the inadequacy of the record for determining the trial court's specific ruling. Pet. App. 43 n. 19. Nevertheless, the court found that any record problems were immaterial "because we focus on the issue as it may arise on remand." *Ibid.* The case necessarily will be remanded for a fourth sentencing proceeding and, under the majority's holding, the trial court

automatic review of the judgment that the trial court erred in excluding the evidence because it was mitigating evidence relevant to the statutory question "[w]hether the defendant should receive a death sentence."[5] Pet. App. 43.

The Oregon Supreme Court first considered the state legislature's intent in authorizing the admission of mitigating evidence that is relevant to whether the defendant should receive a death sentence. Pet. App. 46-52. The court concluded that "the legislature intended to limit the admission of 'mitigating evidence' in penalty-phase proceedings so as to satisfy the Eighth Amendment." Pet. App. 52. "Specifically, the legislature intended to ensure the admissibility of such evidence that the Eighth Amendment *requires* that a penalty-phase jury consider." *Ibid.* (emphasis in original). *See also* Pet. App. 70 ("what the legislature intended to allow as 'mitigating' evidence was precisely what the United States Supreme Court would require pursuant to the federal constitution; nothing more, nothing less.") (Gillette, J., Carson, C.J., con-

---

there must admit "*any* alibi evidence that defendant proffers in mitigation." Pet. App. 64 (emphasis added). Thus the Eighth Amendment issue is squarely presented in this case in spite of any record deficiencies and the focus should be on the future use of alibi evidence, not the particular arguments made in the prior proceedings.

[5] Or. Rev. Stat. § 163.150(1)(b)(D) requires the jury to consider, as one of four questions necessary for the imposition of the death penalty, "[w]hether the defendant should receive a death sentence."

curring in part and dissenting in part).[6] Thus, the court unanimously concluded that the question—whether the alibi evidence offered in this case as mitigation evidence was properly excluded—turns solely on whether the Eighth Amendment, applicable to the States through the Fourteenth Amendment, requires its admission as mitigation evidence.

The court's members parted ways in resolving that federal constitutional question. A three-justice majority concluded that "the Supreme Court's Eighth Amendment jurisprudence suggests that defendant's alibi evidence is the type of evidence that a defendant is constitutionally entitled to introduce during the penalty phase for the jury's consideration." Pet. App. 52. The two dissenting justices viewed the alibi evidence as "not related to any mitigating fact that informs the jury's consideration of the severity of the crime." Pet. App. 85.

As explained in more detail in the argument portion of this brief, the disagreement in the Oregon Supreme Court centered on how the justices read this Court's Eighth Amendment case law. Both the majority and dissent began with this Court's holding that the Eighth Amendment requires the sentencer to consider as mitigation "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant

---

[6] The two justices agreed with the State's concession and therefore concurred in the reversal and remand of this case for a new sentencing proceeding. On the issue before this Court, the two justices dissented, so the State will refer to them as "the dissent" in this brief.

proffers as a basis for a sentence less than death." *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)).[7] Where they differed is in how broadly they read "the circumstances of the offense" under this Court's Eighth Amendment case law.

SUMMARY OF ARGUMENT

The Eighth Amendment requires the sentencer in a capital case to consider mitigation evidence about the defendant's character or record or about the circumstances of the offense. The Oregon Supreme Court misread this Court's case law to require "circumstances of the offense" evidence to include evidence that would challenge the legal foundations of a defendant's convictions. But the Eighth Amendment is more focused. This Court's Eighth Amendment jurisprudence entitles a capital defendant to present evidence addressing his moral culpa-

---

[7] The Oregon legislature also has adopted this Court's definition of mitigation. By statute, the trial court must instruct the jury about specific mitigation factors and, more generally, about mitigation as defined by this Court. Or. Rev. Stat. § 163.150(1)(c); App. 3. The legislature amended this provision in 1995 and 1997 to require consideration of "any aggravating evidence" and victim-impact evidence. The Oregon Supreme Court ruled that, in the fourth sentencing proceeding, "the trial court is precluded [by the state *ex post facto* clause] from retroactively applying the 'any aggravating evidence' provision[,]" but may apply the victim-impact evidence provision, due to a "victim's rights" state constitutional provision that supersedes the *ex post facto* provision. Pet. App. 63-64.

bility only, because that evidence is relevant to the sentencing jury's obligation to conduct an individualized assessment of whether the death penalty is the appropriate sentence. It does not provide a capital defendant with an additional opportunity in the penalty phase to reargue his legal culpability or guilt.

There is no alternative state-law basis for admitting this alibi evidence in the penalty phase as mitigation evidence. As a matter of Oregon law, once a jury finds a defendant guilty of aggravated murder beyond a reasonable doubt, the issue of guilt is not subject to relitigation as part of the sentencing process. Here, the Oregon Supreme Court affirmed defendant's convictions for aggravated murder, reversing and remanding only the penalty phase, and this Court declined to review that judgment. Under well-established principles of state law, defendant would not be permitted to offer evidence in the new sentencing proceeding that is relevant only to call into question his guilt. A defendant has other opportunities within the criminal-justice system to renew challenges to his or her guilt, but that opportunity does not exist in the sentencing proceeding under state law. The Oregon Supreme Court unanimously determined that the issue presented in this case turns on whether, notwithstanding these general finality principles of state law, the Eighth Amendment mitigation requirement entitles a capital defendant, in a resentencing proceeding, to offer evidence that challenges his guilt.

The Oregon Supreme Court's reading of "circumstances of the offense" to include alibi evidence is far broader than this Court has ever suggested is required by

the Eighth Amendment and is inconsistent with the purpose of requiring jury consideration of mitigation evidence in the penalty-phase proceeding. The Eighth Amendment requires a sentencer to consider mitigation evidence in making an individualized determination about whether a defendant—who already has been found guilty of an offense for which the death penalty is a possible punishment—should receive the penalty of death. The purpose of constitutionally required mitigation evidence is not to excuse the defendant's *legal* culpability for the offense. Instead, it gives the sentencing jury the opportunity to assess the defendant's *moral* culpability for the offense already found to have been committed, in order to decide whether the death penalty is the appropriate punishment for the defendant's crimes. To be constitutionally relevant, mitigation evidence about the "circumstances of the offense" must aid the jury in carrying out that individualized assessment about the appropriate punishment. But evidence that, if believed, would negate the defendant's guilt entirely does not assist the jury in performing that function.

Even if the alibi evidence is offered not in an attempt to reverse defendant's conviction, but instead as a basis for arguing that any lingering or residual doubt about defendant's guilt should mitigate against imposition of the death penalty, it is constitutionally irrelevant. In *Franklin v. Lynaugh*, 487 U.S. 164, *reh'g den.*, 487 U.S. 1263 (1988), this Court rejected arguments that residual doubt has any constitutional relevance in a sentencing proceeding. Although the Court found it unnecessary to decide whether residual-doubt evidence and argument must be admitted to satisfy the Eighth Amendment mitigation re-

quirement, the Court's reasoning in rejecting a jury-instruction claim demonstrates that the Oregon Supreme Court misread the scope of the Eighth Amendment requirement.

The Oregon Supreme Court holding in this case has the potential to expand greatly the scope and complexity of capital sentencing proceedings. If the sentencing jury believes evidence offered to overcome the defendant's legal culpability for the crime, the sentencing jury has no appropriate way to give effect to its determination. The sentencing proceeding is limited to a determination of the appropriate penalty for the defendant's crime, and it does not permit a redetermination of the defendant's guilt. Moreover, requiring the sentencing jury to consider the alibi evidence in mitigation may effectively raise the state's burden of proof in capital cases from "beyond a reasonable doubt" to "beyond all doubt." This dramatic extension of this Court's Eighth Amendment case law should be rejected.

ARGUMENT

This case presents a narrow question: whether evidence that specifically challenges a capital defendant's guilt must be presented to and considered by a sentencing jury because it constitutes "circumstances of the offense." The Oregon Supreme Court has construed this Court's case law to require the trial court to admit and the sentencing jury to consider, as mitigation evidence, alibi testimony that would place defendant somewhere other than the scene of the murders, even though the state court previously has upheld defendant's convictions for the murders. In finding an Eighth Amendment require-

ment that the defendant be permitted to introduce this alibi evidence to the sentencing jury, the Oregon Supreme Court misread this Court's case law. The state court failed to consider the reason this Court has held that the Eighth Amendment requires the sentencing jury to consider the "circumstances of the offense" as mitigation evidence. Because the alibi evidence does not serve the purpose of the Eighth Amendment mitigation requirement, the Oregon Supreme Court erred in holding that the Eighth Amendment requires the admission of the alibi evidence in the remanded sentencing proceeding.

I. Under Oregon law, the trial court correctly rejected defendant's alibi evidence and argument because it was irrelevant to the sentencing determination.

There is no alternative state-law basis for admitting this alibi evidence in the penalty phase as mitigation evidence. In Oregon, as in most jurisdictions, once a defendant's guilt has been established, evidence challenging that guilt is not relevant to the sentencing determination. In capital cases, the trial proceedings are divided into a guilt phase and a distinct penalty phase. The purpose of the penalty phase is for the jury to answer four questions:

> (1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death of the deceased or another would result;
>
> (2) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;

(3) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased; and

(4) Whether the defendant should receive a death sentence.

Or. Rev. Stat. § 163.150(1)(b)(A)-(D). The jury's responses to these four questions determine whether the defendant will be sentenced to death, life imprisonment without the possibility of parole, or life imprisonment. Or. Rev. Stat. § 163.150(2), App. 4.

In Oregon, the penalty-phase jury is not asked to reconsider whether the state has met its burden of establishing the defendant's guilt beyond a reasonable doubt. Instead, the narrow focus in the penalty phase is on whether the defendant should receive the death penalty. The focus on the appropriate penalty is the same whether the jury that determined the defendant's guilt is considering the penalty or whether, as in this case, an appellate court has affirmed the defendant's conviction but reversed a death sentence and remanded for a new penalty-phase hearing only. *See State v. Wagner*, 309 Or. 5, 786 P.2d 93, *cert. den.* 498 U.S. 879 (1990) (Oregon Supreme Court affirmed the defendant's convictions for aggravated murder, but remanded the case for the express purpose of conducting further proceedings on the penalty to be imposed); *State v. Moen*, 309 Or. 45, 786 P.2d 111 (1990) (same). And because the penalty phase is focused narrowly on the appropriate sentence, evidence that calls into doubt the defendant's guilt is not relevant to the questions the sentencing jury must answer.

This state-law principle—that certain decisions are treated as final and not subject to further challenge—also applies to specific findings or rulings within a trial. *See State v. Pratt*, 316 Or. 561, 569, 853 P.2d 827, 832, *cert. den.* 510 U.S. 969 (1993) (prior ruling on motion to suppress evidence is law of the case and not open for reconsideration on remand); *see also State v. Green*, 271 Or. 153, 531 P.2d 245 (1975) (case remanded to the trial court for the express purpose of determining whether the defendant killed the victim under extreme mental or emotional disturbance; whether the defendant killed the victim in the first place could not be relitigated); *State v. Boots*, 315 Or. 572, 848 P.2d 76, *cert. den.* 510 U.S. 1013 (1993) (on remand, trial court did not err in limiting the new trial to only a single element that would elevate murder to aggravated murder); *State v. Smith*, 190 Or. App. 576, 578-81, 80 P.3d 145, 145-147 (2003) (en banc), *rev. allowed*, 337 Or. 160 (2004) (Oregon Constitution requires appellate court to affirm a judgment, notwithstanding any error committed during the trial, if the court determines the judgment "appealed from was such as should have been rendered in the case"; this provision requires the appellate court to remand for limited purpose of determining whether an error was prejudicial).

Thus, Oregon law does not entitle defendant, in his fourth sentencing proceeding, to introduce evidence and argue that he is not guilty of the crimes for which he has been convicted. Whether this principle is described as "law of the case," *res judicata*, collateral estoppel, claim preclusion, or simply a matter of relevance, it is firmly established that once a ruling or decision has been made and finally affirmed in a criminal case, it is binding in

further proceedings. In this case, the Oregon Supreme Court has reviewed and affirmed defendant's conviction for aggravated murder and this Court denied review of that determination. Defendant's conviction is final and not subject to reconsideration in a new sentencing proceeding. Nor is evidence that pertains only to defendant's guilt relevant to the sole issue the sentencing jury must decide—whether the appropriate punishment for defendant's crimes is death.

Other state courts have reached the same conclusion—once guilt is established, the defendant cannot urge the sentencing jury to consider the validity of the jury's verdict establishing the defendant's guilt. *See Way v. State*, 760 So. 2d 903, 917 (Fla. 2000), *cert. den.* 531 U.S. 1155 (2001) (defendant may explain the circumstances of the crime, but may not relitigate the question of guilt); *People v. Emerson*, 189 Ill.2d 436, 503, 727 N.E.2d 302, 339, *cert. den.* 531 U.S. 930 (2000) (residual doubt is not relevant to the circumstances of the offense or to the defendant's character and, as a result, is not relevant to the imposition of the death penalty); *Holland v. State*, 705 So. 2d 307, 325 (Miss. 1997), *cert. den.* 525 U.S. 829 (1998) (on appeal from a resentencing trial for capital murder, the issue of guilt is *res judicata* and defendant is collaterally estopped from introducing evidence that challenges the guilty verdict of the original jury); *Evans v. State*, 112 Nev. 1172, 1202-1203, 926 P.2d 265, 284-85 (1996), *cert. den.* 520 U.S. 1245 (1997) (sentencing jury is precluded from considering lingering doubt because to do so it would have to reconsider the defendant's guilt or innocence; jury instruction that informs jury it is precluded from considering lingering

doubt is proper); *State v. Walls*, 342 N.C. 1, 52-53, 463 S.E.2d 738, 765-66 (1995), *cert. den.* 517 U.S. 1197 (1996) (once the jury determines at trial that the defendant is guilty, the sole remaining consideration at sentencing is the appropriate punishment; lingering or residual doubt as to the defendant's guilt is not a relevant circumstance to be submitted in a capital sentencing proceeding); *State v. Biegenwald*, 106 N.J. 13, 70, 524 A.2d 130, 160 (1987) (retrial at sentencing of issues relevant only to guilt is not permitted); *State v. McGuire*, 80 Ohio St. 3d 390, 403, 686 N.E.2d 1112, 1123 (Ohio 1997) ("Residual or lingering doubt as to the defendant's guilt or innocence is not a factor relevant to the imposition of the death sentence because it has nothing to do with the nature and circumstances of the offense or the history, character, and background of the offender[.]"); *Stockton v. Commonwealth*, 241 Va. 192, 210-11, 402 S.E.2d 196, 206-07, *cert. den.* 502 U.S. 902 (1991) (defendant cannot argue at sentencing that later evidence might establish his innocence; the issue of guilt was resolved in the first phase of the trial and could not properly be raised again in the penalty phase).

This is not to suggest that evidence offered to establish a capital defendant's innocence has no significance in any context once the jury has found him or her guilty beyond a reasonable doubt. The point is simply that evidence negating guilt has no relevance in the sentencing proceeding, where the sole question is what penalty is appropriate for the crime of which the defendant already has been found guilty beyond a reasonable doubt. The criminal justice system offers numerous other opportunities for a capital defendant to present evidence challeng-

ing guilt. State law may provide for a new guilt-phase trial if new evidence truly is both newly discovered and potentially exculpatory. *See, e.g.*, Or. Rev. Stat. § 136.535 (App. 1); Or. Rule Civ. Proc. 64 B(4) (App. 6-7). On direct appeal or in state collateral-review proceedings, a defendant may be able to show that alibi or other evidence relevant to guilt was not considered by the guilt-phase jury because of errors of the trial court or of counsel. In the proper circumstances, a defendant may then be entitled to a new trial at which the guilt-phase jury could consider the evidence. Similarly, evidence of actual innocence presented in federal habeas corpus may, under certain circumstances, compel a new guilt-phase trial. *Schlup v. Delo,* 513 U.S. 298 (1995); *Sawyer v. Whitley*, 505 U.S. 333, *reh'g den.* 505 U.S. 1244 (1992). Finally, exculpatory evidence may be presented to the Governor as part of a defendant's request for executive clemency or pardon. *See generally* Or. Const. Art. V, § 14; Or. Rev. Stat. §§ 144.649-144.670.

Notwithstanding the potential relevance of alibi evidence in these other legal settings, that evidence unquestionably is not relevant under Oregon law as mitigation evidence in a capital sentencing proceeding. So the question in this case comes down to a federal constitutional question. On this point, the Oregon Supreme Court was unanimous—the defendant in this case is entitled to introduce alibi evidence as mitigation in the remanded sentencing proceeding only if the Eighth Amendment requires it.

II. The Eighth Amendment requires the sentencer to assess the defendant's character and background and the circumstances of the offense. Evidence that is constitutionally relevant to this assessment must relate to the defendant's moral culpability, not to the defendant's legal culpability.

This Court's Eighth Amendment case law establishes two separate prerequisites to a valid death sentence. First, the Eighth Amendment requires capital sentencing schemes to channel the jury's discretion in order to avoid a system in which the death penalty would be imposed in an arbitrary or unpredictable manner. *Furman v. Georgia*, 408 U.S. 238 (*per curiam*), *reh'g den.* 409 U.S. 902 (1972). The jury's discretion must be directed and limited so as to minimize the risk of wholly arbitrary and capricious action. *Proffitt v. Florida*, 428 U.S. 242, *reh'g den.* 429 U.S. 875 (1976); *Gregg v. Georgia*, 428 U.S. 153, *reh'g den.* 429 U.S. 875 (1976).

The second principle, in some tension with the first, is that the Eighth Amendment requires the jury to make an individualized sentencing determination, taking into consideration relevant mitigating evidence about the defendant. "Relevance" has no different meaning for mitigating evidence in a capital sentencing proceeding than it does for any other type of evidence, so the threshold for relevance is low. *McKoy v. North Carolina*, 494 U.S. 433 (1990). But there are limits, and the extent of those limits is what divided the Oregon Supreme Court in this case.

Both the majority and the dissent recognized this Court's consistent definition of constitutionally relevant mitigating evidence as encompassing three areas: (1)

evidence of the defendant's character; (2) evidence of the defendant's background; and (3) evidence of the circumstances of the offense. Obviously, alibi evidence does not relate to a defendant's character or background. So this case turns on whether alibi evidence relates to the circumstances of the offense. The *Guzek III* majority answered the question by fact-matching the alibi evidence in this case to evidence in other cases that this Court held must be considered by the jury as mitigation evidence. Although correctly noting many of the holdings from this Court's Eighth Amendment case law, the *Guzek III* majority failed to appreciate the underlying reason why capital sentencing juries must consider constitutionally relevant mitigating evidence, including evidence about the circumstances of the offense. The simplest way to understand why sentencing juries must consider this evidence and, therefore, what limits states may place on this evidence, is to trace how the principle of individualized sentencing developed.

In *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976), a plurality of the Court concluded that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Two years later, a plurality of the Court again held that the Eighth Amendment requires that the jury "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than

death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original).

That holding became the majority view in *Eddings*, and *Eddings* further held that the jury must give consideration to any relevant mitigating evidence offered by the defendant as the basis for a sentence less than death. 455 U.S. at 113-114. But, once again, the Court limited that constitutionally relevant mitigating evidence to evidence of the defendant's character and record and evidence of the circumstances of the offense.

As the Court explained, the Eighth Amendment requirement that the sentencing jury consider mitigation evidence of that nature traces back to the early days of the common law and the "twin objectives" that "the legal system has struggled to accommodate." *Id.* at 110. Those "twin objectives" are the two principles described at the outset of this argument: the need to have consistency and structure in a capital punishment system and the need to consider the uniqueness of the individual. *Id.* at 111. Moving too far in either direction runs afoul of the Eighth Amendment. Thus, a mandatory death sentence provides consistency and structure, but at the cost of ignoring individual differences. *Woodson*, *supra*, 428 U.S. at 304 (opinion of Stewart, Powell, and Stevens, JJ.) (a mandatory death sentence "that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind").

More specifically, the Eighth Amendment requires the sentencer to make an individualized determination about the defendant's moral culpability. *Penry*, 492 U.S. at 319. In *Penry*, this Court explained:

> Underlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). Moreover, *Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. *Hitchcock v. Dugger*, [481 U.S. 393, 398-399 (1987)]. Only then can we be sure that the sentencer has treated the defendant as a "uniquely individual human bein[g]" and has made a reliable determination that death is the appropriate sentence. *Woodson*, 428 U.S., at 304, 305. "Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime." *California v. Brown*, *supra*, at 545 (O'Connor, J., concurring) (emphasis in original).

Ibid.

Thus, evidence that a defendant, although guilty of the crime, may have played a lesser role than co-defendants in causing the victim's death is constitutionally relevant mitigating evidence about the circumstances of the offense. That evidence helps the sentencer make an individualized determination about the defendant's moral culpability[8] and, therefore, helps the sentencer determine the appropriate sentence that should be imposed as punishment for the offense. Evidence that does not aid the sentencer in resolving that specific question—the ap-

---

[8] Some of the confusion in this area stems from the overlapping terminology used to describe the determination the jury makes in the guilt phase and the determination the jury makes in the penalty phase. Often, both are described in terms of culpability, with the guilt phase focused on legal culpability or blameworthiness and the penalty phase focused on moral culpability or deathworthiness. *See* Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 Fordham L. Rev. 21, 26-27 (1997) ("Deathworthiness is broad enough to include all of the factors relevant to the sentencing decision: the defendant's culpability for the crime, as well as his character, record, and background, and the circumstances and character of the murder. Deathworthiness appropriately refocuses the inquiry from whether the defendant is blameworthy—the question resolved at the guilt phase—to whether the defendant is worthy of being sentenced to death—the judgment made at the punishment phase."). In this brief, the State differentiates these two distinct concepts by using the phrases "legal culpability" for the guilt-phase determination and "moral culpability" for the penalty-phase determination.

propriate sentence to be imposed for the defendant's crime—is not constitutionally relevant mitigating evidence.[9]

Further insight into the proper scope of Eighth Amendment mitigation evidence can be gained by looking at the two distinct phases of the capital sentencing process, the eligibility phase and the selection phase. *Tuilaepa v. California*, 512 U.S. 967, 971 (1994). The purpose of the eligibility phase is to narrow the class of defendants eligible for the death penalty, typically through consideration of aggravating circumstances. *Id.* at 971-72. The jury then must determine, in the selection phase, whether to impose a death sentence on an eligible defendant. *Id.* at 972. The requirement that the jury be permitted to consider and give effect to relevant mitigating evidence applies only in the selection phase. *Buchanan v. Angelone*, 522 U.S. 269, 275-76 (1998). "[T]he state may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence." *Id.*, at 276 (*citing Johnson v. Texas*, 509 U.S. 350, 362, *reh'g den.* 509 U.S. 941 (1993); *Penry*, *supra*, at 326; *Franklin*, 487 U.S. at 181). But what is relevant in the selection phase turns on the purpose of that phase—deciding the appropriate penalty for a defendant already determined to be eligible for the death penalty.

---

[9] Jury consideration of the defendant's role in the crime also promotes society's legitimate interest in retribution and deterrence. *See Skipper v. South Carolina*, 476 U.S. 1, 13 (1986) (Powell, J., concurring).

Thus, the Eighth Amendment requires the sentencing jury to consider any aspects of the defendant's character or background and aspects of the offense that help the jury make an individualized assessment of whether the particular defendant should receive the death penalty for the offense the defendant has been found to have committed. Unlike evidence a defendant may offer in the guilt phase, constitutionally relevant mitigation evidence does not provide an excuse from criminal responsibility. Instead, it focuses on the defendant as an individual and on whether the death penalty is the appropriate sentence given the defendant's individual characteristics. [10]

---

[10] In some circumstances, evidence offered in the guilt phase and the penalty phase may have considerable overlap. For example, a defendant may present evidence of mental illness as part of an insanity defense in the guilt phase and may offer very similar evidence in the penalty phase as mitigation evidence. But the focus for the jury is different, even though the evidence may be similar. In the guilt phase, the focus is on whether the mental illness so impaired the defendant's judgment that he or she cannot be held criminally responsible for his or her actions. In the penalty phase, the focus is on whether the death penalty is an appropriate punishment for a defendant who may lack the ability to make certain choices even though that lack of ability does not excuse the defendant's guilt. *See also Eddings*, 455 U.S. at 115-16 (describing youth as "a time and condition of life when a person may be most susceptible to influence and psychological damage"; consideration of youth in the penalty phase recognizes that minors "generally are less mature and responsible than adults" and often lack the judgment expected of adults); *Graham v. Collins*, 506 U.S. 461, 518, *reh'g den.* 507 U.S. 968 (1993) (Souter, J., dissenting) ("Youth may be understood to mitigate

Viewed in this light, mitigation evidence about the circumstances of the offense does not include all aspects of the offense that were litigated in the guilt phase, but only aspects of the offense that assist the jury in making the assessment of moral culpability. Typically, that will be limited to aspects of the offense that are not specific elements needed to establish guilt. The *Guzek III* dissent's description of the type of evidence that would be constitutionally relevant seems complete: evidence that "describe[s] the reason that defendant committed the offense, his conduct during the offense, his relative participation in the offense, or any other fact or circumstance regarding the offense itself that would reduce his moral responsibility." Pet. App. 84. Because the alibi evidence at issue in this case describes none of those things, it is relevant only to defendant's legal culpability and not to defendant's moral culpability. And, as discussed in detail below, any doubt about the scope of the mitigation evidence related to circumstances of the offense is dispelled by the Court's reasoning in *Franklin*.

III. *Franklin*'s residual-doubt discussion makes it clear that evidence challenging guilt cannot constitute evidence of the "circumstances of the offense" for purposes of the Eighth Amendment.

In *Lockett*, *Bell*, and other cases, this Court has addressed evidence that must be considered as mitigation evidence under the Eighth Amendment. Much of this

---

by reducing a defendant's moral culpability for the crime, for which emotional and cognitive immaturity and inexperience with life render him less responsible[.]").

Court's case law has focused on evidence of the defendant's character and background. *See, e.g., Hitchcock*, 481 U.S. at 397-399 (difficult circumstances of defendant's upbringing and his potential for rehabilitation as mitigating evidence); *Skipper*, 476 U.S. at 8 (defendant's good adaptation to prison life as mitigating evidence); *Eddings*, 455 U.S. at 115-116 (16-year-old defendant's troubled family history and emotional disturbance as mitigating evidence); *Lockett*, 438 U.S. at 608 (plurality opinion) (youth as a relevant mitigating circumstance). For this type of mitigating evidence, the Court has stated that "virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Payne*, 501 U.S. at 822.

By contrast, the Court's description of mitigation evidence that pertains to "circumstances of the offense" demonstrates that this evidence can be limited to exclude evidence that would negate the defendant's guilt. In *Tuilaepa*, this Court approved a statutory requirement that the sentencer consider the "circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true." 512 U.S. at 975-76. In rejecting the defendants' vagueness challenge, the Court described this jury instruction as "implement[ing] what we have said the law requires." *Id.* at 976. "The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence." *Ibid.* In *Blystone v. Pennsylvania*, 494 U.S. 299, 305 (1990), this Court similarly approved a state statute that authorized the

death penalty "only after a determination that the aggravating circumstances outweigh the mitigating circumstances present in the particular crime committed by the particular defendant[.]" *See also Sumner v. Shuman*, 483 U.S. 66, 79-80 (1987) (describing the need to consider that "the level of criminal responsibility of a person convicted of murder may vary according to the extent of that individual's participation in the crime" and providing examples of the "variety of circumstances that may surround a murder by a life-term inmate"). In each of these cases, the Court focused on the need for the sentencing jury to consider information about the circumstances of the particular crime. Nothing in the Court's discussions suggests that the need for jury consideration of the circumstances of the offense extends to circumstances that would eliminate the defendant's responsibility for the offense.

This Court's reasoning in *Franklin* offers the best analysis of the limits that apply in defining evidence of "circumstances of the offense." *Franklin* involved a challenge to jury instructions on mitigation evidence. The jury found the defendant guilty of capital murder. 487 U.S. at 168. In the penalty phase, the trial court rejected some of the defendant's requested jury instructions. *Id.* at 170. On appeal, the defendant argued that the jury instructions "did not provide sufficient opportunity for the jury, in the process of answering the two Special Issues, to consider whatever 'residual doubt' it may have had about [the defendant's] guilt." *Id.* at 172. Specifically, the defendant argued that the jury may have harbored residual doubts about his identity as the murderer, about the extent to which his actions actually caused the vic-

tim's death, and about the extent to which his actions were intended to cause the victim's death. *Ibid.* He sought a ruling from this Court that the jury should have been instructed that it could consider residual doubt on these issues in determining the appropriate penalty.

Writing for four members of the Court, Justice White rejected the defendant's assertion that *Lockhart v. McCree*, 476 U.S. 162, 180-82 (1986), supported his claim that he was constitutionally entitled to a residual-doubt instruction. Justice White noted that *Lockhart*'s discussion of residual doubt stood for the "simple truism" that, where states permit residual-doubt argument, the doubt works in favor of the defendant. *Franklin*, 487 U.S. at 173. Justice White noted further that "the *Lockhart* dissent recognized that there have been only a 'few times in which any legitimacy has been given' to the notion that a convicted capital defendant has a right to argue his innocence during the sentencing phase." *Ibid.* (quoting *Lockhart*, 476 U.S. at 205-06 (Marshall, J., dissenting)).[11] Justice White summarily dismissed the idea that the Eighth Amendment mitigation requirement would stretch so far as to include residual doubt over the defendant's guilt. Nothing in pertinent Eighth Amendment jurisprudence "mandates reconsideration by capital juries, in the sentencing phase, of their 'residual doubts' over defendant's guilt." *Franklin*, 487 U.S. at 174. "Such

---

[11] In *Lockhart*, the dissent also noted that the Court had consistently refused to grant *certiorari* in state cases holding that residual doubts could not properly be considered during capital sentencing proceedings, leaving those holdings in place. 476 U.S. at 205-06.

lingering doubts are not over any aspect of petitioner's 'character,' 'record,' or a 'circumstance of the offense.' This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor." *Ibid.*

The Court went on to identify an additional, and alternative basis for rejecting the defendant's claim that he was entitled to the instruction he had requested. The Court concluded, in any event, that the defendant had not been precluded from making a residual-doubt argument and that the rejection of the instruction "was without impact on the jury's consideration of the 'residual doubts' issue." *Ibid.* But the Court took one final opportunity to signal its skepticism about the validity of the defendant's residual-doubt argument:

> In sum, even if petitioner had some constitutional right to seek jury consideration of "residual doubts" about his guilt during his sentencing hearing—a questionable proposition—the rejection of petitioner's proffered jury instructions did not impair this "right."

Id. at 175.

Justice O'Connor, joined by Justice Blackmun, wrote separately to address squarely the issue presented in this case. Beginning with the principle "that punishment should be directly related to the personal culpability of the criminal defendant," *Id.* at 184, Justice O'Connor also rejected the defendant's residual-doubt argument:

> In my view, petitioner's "residual doubt" claim fails, not because the Texas scheme allowed for consideration of "residual doubt" by the sentencing body,

but rather because the Eighth Amendment does not require it. Our cases do not support the proposition that a defendant who has been found to be guilty of a capital crime beyond a reasonable doubt has a constitutional right to reconsideration by the sentencing body of lingering doubts about his guilt. . . .

Our decisions mandating jury consideration of mitigating circumstances provide no support for petitioner's claim because "residual doubt" about guilt is not a mitigating circumstance. We have defined mitigating circumstances as facts about the defendant's character or background, or the circumstances of the particular offense, that may call for a penalty less than death. . . . "Residual doubt" is not a fact about the defendant or the circumstances of the crime. It is instead a lingering uncertainty about facts, a state of mind that exists somewhere between "beyond a reasonable doubt" and "absolute certainty." Petitioner's "residual doubt" claim is that the States must permit capital sentencing bodies to demand proof of guilt to "an absolute certainty" before imposing the death sentence. Nothing in our cases mandates the imposition of this heightened burden of proof at capital sentencing.

Id. at 187-188.

On the residual-doubt question, Justice O'Connor disagreed with the plurality not with respect to its discussion of residual doubt about the killer's identity in *Franklin*, or about guilt in general, but only with respect to its resolution of the defendant's arguments about "potential [residual] jury doubts over his responsibility for

the victim's death, and [about] the extent to which he intended the victim's death." *Franklin*, 487 U.S. at 187 (O'Connor, J., concurring). The plurality had rejected those latter two arguments on the basis that, because the questions presented to the penalty-phase jury had required it to determine if the defendant had deliberately caused the victim's death, they did not "limit[] the jury's consideration of any [lingering] doubts in these respects." 487 U.S. at 175. Justice O'Connor concluded that, in light of the other instructions that the jury had received, "[t]his conclusion is open to question." 487 U.S. at 187. She rejected the defendant's arguments "not because the Texas scheme [already] allowed for consideration of 'residual doubt' by the sentencing body, but rather because the Eighth Amendment does not require it." 487 U.S. at 187. But both Justice O'Connor and the plurality agreed that, with respect to questions about a defendant's guilt generally, nothing in the Eighth Amendment requires a penalty-phase jury to consider residual doubt.[12]

---

[12] The *Franklin* dissent concluded that additional instructions were required to "allow the jury to give adequate weight to the evidence of [the defendant's] conduct in prison," because the instructions that were given allowed the jury to consider that evidence only "insofar as it shed light on [the defendant's] probable future conduct." 487 U.S. at 190 (Stevens, J., dissenting, joined by Brennan, J. and Marshall, J.). "[The defendant] therefore was at least entitled to an instruction informing the jury that it could answer one of the issues 'no' if it found by that evidence that [the defendant's] character was such that he should not be subjected to the ultimate penalty." *Id.* at 192.

As will be discussed below, the *Guzek III* majority dismissed *Franklin* as merely a decision about jury instructions. As the State described in its *certiorari* petition, no other court has construed the holding in *Franklin* so narrowly, and this Court, too, has described the holding in broader terms. The year following *Franklin*, this Court described its holding as follows: "a majority agreed that 'residual doub[t]' as to Franklin's guilt was not a constitutionally mandated mitigating factor." *Penry*, 492 U.S. at 320 (*citing Franklin*, 487 U.S. at 173, and n. 6 (plurality opinion); and at 187-88 (O'Connor, J., concurring in judgment)). Given the strong language of *Franklin*'s plurality opinion, its application to this case cannot be passed over so lightly.

IV. The Oregon Supreme Court's holding goes well beyond the Eighth Amendment requirement that sentencing juries consider the circumstances of the offense as part of the individualized determination whether death is the appropriate sentence.

The Oregon Supreme Court concluded that this Court's case law mandates the admission and jury consideration of alibi evidence offered in mitigation.[13] Al-

---

[13] The court's holding is limited to the admissibility of alibi evidence. However, that holding must be read in context of the state's statutory scheme governing the death penalty. If the alibi evidence is admitted as constitutionally relevant mitigation evidence, as it must be under the court's holding, the defendant is permitted to argue that the jury should consider the evidence in answering the fourth question about mitigation and the trial court must instruct the jury to consider that evidence. Or. Rev. Stat. § 163.150, App. 1-6. Thus, the

though the court began its analysis by considering this Court's Eighth Amendment jurisprudence, the state court ultimately based its holding almost entirely on its reading of the factual circumstances in a Due Process case, *Green v. Georgia*, 442 U.S. 95 (1979) (*per curiam*). Because it saw the facts in *Green* as comparable to Guzek's attempt to introduce alibi evidence in the sentencing proceeding here, it felt compelled to conclude that the Eighth Amendment requires jury consideration of defendant's alibi evidence. But, as the *Guzek III* dissent pointed out, the majority's reading of *Green* places considerably more weight on that case than it can bear. Moreover, the majority failed to acknowledge this Court's reasoning in *Franklin* and it gave little consideration to the reason that the Eighth Amendment requires certain evidence to be considered by the sentencer. As a result, the majority's conclusion finds no support in this Court's Eighth Amendment case law.

Before turning to *Green*, the Oregon Supreme Court majority considered the specific evidence at issue in *Lockett* and the companion case, *Bell v. Ohio*, 438 U.S. 637 (1978). In *Lockett*, the jury found the defendant guilty of aggravated murder based on her participation in a robbery and not on her role in actually causing the victim's death. 438 U.S. at 589-93. In the sentencing proceeding, the defendant offered evidence about her minor

---

implication of the court's holding that the alibi evidence is admissible is that capital defendants in this and other penalty-phase proceedings will be permitted both to submit evidence that would negate guilt and to argue, on the basis of that evidence, that the defendant should not receive the death penalty.

role in the robbery and this Court focused on whether the state statutory scheme permitted the sentencing judge to consider that evidence. This Court concluded that the statutory scheme violated the Eighth Amendment because the sentencing judge was not permitted to consider "a defendant's comparatively minor role in the offense, or age." *Id.* at 608.

The evidence at issue in *Bell* was similar to the evidence in *Lockett*. Again, the jury found the defendant guilty of aggravated murder based on his participation in a kidnapping that resulted in the murder. *Bell*, 438 U.S. at 639-40. The defendant offered evidence in the sentencing proceeding to demonstrate his minor role in the kidnapping. *Id.* at 641. This Court overturned his sentence because the state statutory scheme prevented the sentencing court "from considering the particular circumstances of his crime and aspects of his character and record as mitigating factors." *Id.* at 642.

The majority in the Oregon Supreme Court recognized that the alibi evidence in this case is distinguishable from the evidence at issue in *Lockett* and *Bell*:

> [W]e acknowledge that the juries in *Lockett* and *Bell* appear to have based their respective guilty verdicts for capital murder on factual findings that the defendants actively had participated in the underlying felonies of aggravated robbery (*Lockett*) and aggravated kidnapping (*Bell*), which, by operation of state law, allowed the juries also to find the defendants guilty of capital murder. Such guilt-phase findings therefore would have left open the possibility that proffered sentencing-phase evidence that the defendants had

> not intended to kill the victims, or otherwise had played only peripheral parts in the underlying felonies (although with the requisite intent respecting those felonies), would mitigate against imposition of the death penalty, notwithstanding the earlier capital murder convictions. Defendant in this case, by contrast, was convicted of the aggravated murders . . . of both victims. Defendant's alibi evidence was inconsistent with those convictions; by contrast, the mitigating evidence at issue in *Lockett* and *Bell* was consistent with the underlying convictions, because the defendants could have been convicted of capital crimes notwithstanding their lessened culpability respecting the capital murders.

Pet. App. 57-58.

Despite this distinction, the *Guzek III* majority concluded that this Court's case law required a significantly broader reading of the "circumstances of the offense," one that would encompass much more than the kind of evidence at issue in *Lockett* and *Bell*. The *Guzek III* majority reached this conclusion based almost entirely on its reading of *Green*.

In *Green*, the defendant wanted to introduce the hearsay testimony of a witness who had testified for the state in a co-defendant's prior separate trial. 442 U.S. at 96. The witness would have testified on Green's behalf that the co-defendant had confessed that he caused the victim's death. This Court held that the evidence was relevant at Green's sentencing phase and that its exclusion violated the Due Process Clause. The *Guzek III* majority read *Green* to hold that, "under *Lockett*, [Green's] evi-

dence that he had not participated in the murder was a relevant circumstance of the offense that the sentencer must consider, notwithstanding that the defendant already had been convicted of the victim's murder." Pet. App. 60. Because nothing in this Court's or the Georgia Supreme Court's description of the case revealed that Green had been convicted of felony murder or on an aid-and-abet theory of guilt, the *Guzek III* majority concluded that Green, unlike Lockett and Bell, had been convicted on a theory of murder that depended on his personally causing the victim's death. Pet. App. 58-59. The majority concluded that the facts in this case "appear to be analogous" to the facts in *Green*, and it therefore determined that the Eighth Amendment requires that the jury consider alibi evidence in a penalty-phase proceeding. Pet. App. 60-61.

For the *Guzek III* dissent, the distinction between the evidence at issue in *Lockett* and *Bell* and the alibi evidence in this case was critical in leading them to the opposite conclusion: that the Eighth Amendment does not require the sentencing jury to hear alibi evidence because it challenges the conviction itself and does not merely attempt to reduce the defendant's moral culpability. The *Guzek III* dissent disagreed with the majority's conclusion that *Green* demands the broad definition of constitutionally relevant mitigating evidence that the majority adopted in this case.

As a starting point, the *Guzek III* dissent disagreed with the majority that the evidence in *Green* differed meaningfully from the evidence in *Lockett* and *Bell*. The dissent focused on this Court's description in *Green* that

"[t]he evidence at trial tended to show that [Green] and Moore abducted [the victim] from the store where she was working alone and, acting either in concert or separately, raped and murdered her." *Green*, 442 U.S. at 96. To the *Guzek III* dissent, this description sounded like felony murder. Pet. App. 73-74. Moreover, felony murder "would make sense from the state's perspective in *Green*."[14] Pet. App. 74-75. Finally, the dissent concen-

---

[14] Under Georgia's statutory scheme at the time, the crime of murder was defined as including felony murder and "malice murder." Following a determination of guilt, the jury would then consider additional evidence, and it needed to find one or more of the statutory aggravating circumstances to impose a death sentence. *See Gregg*, 428 U.S. at 162-66 (1976) (describing Georgia's statutory scheme for the imposition of the death penalty). In Green's case, the jury found him guilty of murder and, in the pre-sentence hearing, found two statutory aggravating circumstances: (1) the offense of murder was committed while Green was engaged in the commission of kidnapping and armed robbery and (2) the offense of murder was outrageously and wantonly vile, horrible and inhumane in that it involved the torture of the victim and depravity of mind on the part of the defendant. *Green v. State*, 242 Ga. 261, 270, 274, 249 S.E.2d (1978). The dissent in the Oregon Supreme Court appears correct in understanding the circumstances in *Green* as similar to those in *Lockett* and *Bell*. Other courts, too, have read *Green* as factually similar to *Lockett* and *Bell*. *See State v. Fletcher*, 354 N.C. 455, 473, 555 S.E.2d 534, 545 (2001), *cert. den.* 537 U.S. 846 (2002) ("The excluded evidence suggesting that the defendant did not personally kill the victim was consistent with the guilty verdict in *Green* . . . and would not have prompted the jury . . . to consider residual doubt.").

trated on *Green*'s citation to Justice Blackmun's concurrence in *Lockett*:

> The Court's citation to Justice Blackmun's concurrence is revealing, because, in *Lockett*, Justice Blackmun took a narrower approach than the plurality. He would have held only that a state court may not sentence an aider-and-abettor to death without allowing the sentencer to consider the extent of that person's involvement, and degree of *mens rea*, in the commission of the homicide. *Lockett*, 438 U.S. at 614. By citing Justice Blackmun's concurrence and its discussion of aiding-and-abetting liability, the Court reveals that the "critical issue" in *Green* is whether a defendant—who, along with a codefendant, has been found guilty of murder—may show that his *relative* culpability for the crime is minimal because he neither participated in the killing nor intended it to occur.

Pet. App. 75 (emphasis in original).

Thus, for the dissent, the evidence at issue in *Green* was akin to the evidence at issue in *Lockett* and *Bell*. In all three cases, the proffered mitigation evidence was relevant to establish the defendant's relative moral culpability, not to disprove his legal culpability. If that is accurate—and the State agrees with the dissent on this point—the difference between the alibi evidence at issue in this case and the evidence at issue in this Court's prior cases effectively eliminates the central prop of the Oregon Supreme Court majority's reasoning. Without a factual similarity between the evidence in *Green* and the alibi evidence in this case, there is little in the form of al-

ternate reasoning that would support the *Guzek III* majority's holding in this case.

It is worth noting the other criticisms that the *Guzek III* dissent made of the majority's reliance on *Green*, as these provide additional reasons for rejecting the majority's analysis and conclusion. The *Guzek III* majority relied on this Court's statement in *Green* that the evidence at issue "was highly relevant to a critical issue in the punishment phase of the trial." Pet. App. 60-62 (quoting *Green*, 442 U.S. at 97). Again based on its view of *Green* as factually similar to *Lockett* and *Bell*, the *Guzek III* dissent read this statement in *Green* as saying nothing different from what the Court previously said in *Lockett*. In both *Lockett* and *Bell*, the testimony was relevant because it went to the defendant's moral culpability—whether he was a minor participant in the crime—an issue that is unquestionably relevant in the sentencing phase. Pet. App. 76-77. Finally, the *Guzek III* dissent emphasized the other differences between *Green* and this case: *Green* is based on the Due Process Clause, not the Eighth Amendment; in *Green*, the State had relied on the evidence (a codefendant's confession) to convict the codefendant; the State in *Green* invited the jury to infer that Green was a direct participant in the killing, but prevented Green from offering this evidence to counter the State's argument; and this Court issued a very brief opinion in *Green* that took pains to limit its holding to the facts of that case. Pet. App. 77-79.

The *Guzek III* dissent's criticisms of the majority's reliance on *Green* are compelling. No other court has read *Green* in the same way as the Oregon Supreme

Court. It would be sufficient to conclude that the Oregon Supreme Court simply misconstrued the factual circumstances in *Green* and, because the result depends so heavily on that construction, to reverse the state court's conclusion on that ground alone. But, even if the *Guzek III* majority is correct in its reading of the factual circumstances in *Green*, the state court's conclusion simply cannot be squared with this Court s narrower view of the Eighth Amendment mitigation requirement. As described above, the underlying purpose of that requirement is to ensure that the sentencer considers evidence of the defendant's moral culpability; it does not extend to requiring the sentencer to consider alibi evidence or other evidence that is relevant only to the defendant's legal culpability or guilt.

Even more problematic for the *Guzek III* majority than its reliance on *Green* is its failure to acknowledge this Court's reasoning in *Franklin*. The state court attempted to distinguish between the residual-doubt evidence in *Franklin* and the alibi evidence in this case as follows:

> We note that, in *Franklin v. Lynaugh*, 487 U.S. 164, 172, 174, *reh'g den*, 487 U.S. 1263 (1988), a plurality of the Supreme Court strongly suggested, and the concurrence would have held, that the Eighth Amendment does not require an *instruction* that a penalty-phase jury consider any *residual or lingering doubts* remaining from the guilt phase. *Id.* at 187-88 (O'Connor, J., concurring). However, nothing in that decision lessened the direction from *Lockett*, *Bell*, *Eddings*, and *Green* that the Eighth Amendment *does*

> require that a defendant be permitted to *introduce*, and a jury be able to consider, *mitigating evidence relevant to any circumstances of the offense*, such as evidence that would lessen the defendant's culpability in the offense. Simply stated, a "residual" or "lingering doubt[]" remaining from the guilt phase, *Franklin*, 487 U.S. at 174, is qualitatively different from actual "evidence" proffered during the penalty phase.

Pet. App. 62-63 n. 30 (emphasis in original).

It is unclear how this "distinction" makes any difference in the analysis of this case.[15] It is true that defendant could argue, if alibi evidence is admitted, either that the jury should determine that he is not guilty of the crimes for which he has been convicted or, alternatively, that the jury should merely consider lingering doubts about his guilt in making the sentencing determination. But in either case, the evidence is constitutionally relevant only if it concerns a "circumstance of the offense." And, in either case, the only decision the jury can make, if it is persuaded by defendant's "alibi" argument, is to impose a

---

[15] The Oregon Supreme Court casts *Green*, along with *Lockett*, *Bell* and *Eddings*, as part of the pertinent body of case law at the time this Court decided *Franklin*. But it is worth noting that this Court did not cite *Green* in *Franklin*. If the Oregon Supreme Court is correct in construing *Green* to hold that "the defendant's evidence that he had not participated in the murder was a relevant circumstance of the offense that the sentencer must consider, notwithstanding that the defendant already had been convicted of the victim's murder[,]" Pet. App. 60, it seems an unusual omission, especially from Justice O'Connor's concurrence.

severe sentence of life in prison instead of a sentence of death. But if the jury is truly persuaded by the defendant's alibi evidence, even a sentence of life in prison is unwarranted. Because of the limited role the sentencing jury plays in the penalty phase, defendant's alibi evidence is not relevant, whether it is introduced as evidence or used in argument to the jury, and whether it is or is not accompanied by a jury instruction.

V. This Court should reject the Oregon Supreme Court's holding that the Eighth Amendment gives a capital defendant the right to present evidence and argument at sentencing that would call into question the defendant's guilt.

The Oregon Supreme Court's holding permits any capital defendant to offer alibi evidence and argument in the penalty phase that is related not to the defendant's specific role in the offense, but instead calls into question the defendant's guilt. Under that holding, the alibi evidence can be used either to directly challenge the defendant's guilt or as part of a residual-doubt argument asking the jury to consider lingering doubt when determining the appropriate penalty. Either way, the evidence is not required by the Eighth Amendment.

First, it is important to note that the impact of the Oregon Supreme Court's holding is not limited to alibi evidence. The court's reasoning appears to encompass any evidence a capital defendant offers in mitigation that directly challenges the defendant's guilt. As the *Guzek III* dissent noted, "it is conceivable that, after this opinion, scientific evidence challenging the accuracy of eyewitness testimony or fingerprint evidence admitted during

the guilt phase could be considered relevant to a 'circumstance of the offense.'" Pet. App. 84 n. 34. Broad reliance on this holding will greatly expand the scope, complexity, and cost of penalty-phase trials. Most importantly, it will expand the penalty phase to encompass issues not appropriate for the sentencer's consideration.

If the evidence is presented to establish innocence, it is not related to any question the jury must answer in the penalty phase. As discussed above, the Eighth Amendment requires an individualized determination of whether death is the appropriate sentence, but it does not expand the penalty phase into a new opportunity to litigate guilt. Although the threshold for constitutionally relevant mitigation evidence is low, the state court's holding conflicts with this Court's repeated statement that the Eighth Amendment mitigation requirement does not override the States' ability to exclude evidence as irrelevant. *See, e.g.*, *Lockett*, 438 U.S. at 604 n. 12 ("Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense."). If evidence challenging the defendant's guilt is somehow relevant to the question of the appropriate penalty, the State's traditional authority to exclude irrelevant evidence offered in mitigation is largely illusory.

Moreover, expanding the penalty-phase proceeding to include relitigation of the defendant's guilt potentially raises questions about the validity of the defendant's conviction. But the Oregon Supreme Court has affirmed defendant's conviction, *Guzek I*, and it is not subject to attack in this proceeding. To present the sentencing jury

with evidence directed to a point it cannot consider can only lead to confusion about the jury's role in the remanded penalty-phase proceeding. As the Ohio Supreme Court stated in *McGuire*, 80 Ohio St. 3d at 403, 686 N.E.2d at 1123:

> Our system requires that the prosecution prove all elements of a crime beyond a reasonable doubt. Therefore, it is illogical to find that the defendant is guilty beyond a reasonable doubt, yet then doubt the certainty of the guilty verdict by recommending mercy in case a mistake has occurred. . . . Residual doubt casts a shadow over the reliability and credibility of our legal system in that it allows the jury to second-guess its verdict of guilt in the separate penalty phase of a murder trial. "Thus, if residual doubt is reasonable and not simply possible or imaginary, then an accused should be acquitted, and not simply have his death sentence reversed."

(Citations omitted). In a similar vein, the Florida Supreme Court stated, "A convicted defendant cannot be 'a little bit guilty.' It is unreasonable for a jury to say in one breath that a defendant's guilt has been proven beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy." *Buford v. State*, 403 So. 2d 943, 953 (Fla. 1981), *cert. den.* 454 U.S. 1163 (1982).

In addition to creating confusion in the penalty-phase proceeding, this second-guessing of the verdict could create special difficulties in state collateral-review and federal habeas corpus proceedings. If the sentencing jury is persuaded by the alibi evidence, it nevertheless is lim-

ited to imposing a life sentence for defendant's conviction. In a collateral-review or federal habeas corpus proceeding, the sentencing jury's view of defendant's guilt does not necessarily establish a legal basis for overturning his conviction, which was properly established before the guilt-phase jury beyond a reasonable doubt. There is no confusion if the sentencing jury is presented only with evidence relevant to determining the appropriate sentence and defendant's guilt is not put at issue.

A capital defendant could argue that evidence like the alibi evidence in this case is not presented to establish innocence, but is presented simply to raise doubts about guilt, and to support an argument that any lingering or residual doubt weighs against imposing the death penalty. Although the *Guzek III* majority's attempt to distinguish *Franklin* suggests the faint possibility that it would view the Eighth Amendment as not entitling a defendant to make such an argument, it is difficult to understand how that distinction could be drawn. In any event, alibi evidence is irrelevant even if used this way because it does not help the jury make an individualized determination about the defendant's moral culpability. Rather, it improperly attacks the defendant's legal culpability.

Moreover, using alibi evidence as a basis to argue that the jury should consider residual doubt about the defendant's guilt in determining the appropriate sentence could raise questions about whether the practice of a limited remand of a death sentence is constitutional, as Justice White noted in *Franklin*:

> Finding a constitutional right to rely on a guilt-phase jury's "residual doubts" about innocence when

> the defense presents its mitigating case in the penalty phase is arguably inconsistent with the common practice of allowing penalty-only trials on remand of cases where a death sentence—but not the underlying conviction—is struck down on appeal. . . .
>
> In fact, this Court has, on several previous occasions, suggested such a method of proceeding on remand. . . .
>
> In sum, we are quite doubtful that such "penalty-only" trials are violative of a defendant's Eighth Amendment rights. Yet such is the logical conclusion of petitioner's claim of a constitutional right to argue "residual doubts" to a capital sentencing jury.

487 U.S. at 173-74 n. 6.

Equally important, no matter how the alibi evidence is used in the penalty phase, the Oregon Supreme Court's holding could effectively raise the State's burden in capital cases. If the defendant is permitted to argue that jurors, who already have found the defendant guilty beyond a reasonable doubt, should consider any lingering doubt in the sentencing phase, the State will be placed in the difficult position of attempting to overcome what some have referred to as "whimsical" doubt. *Holland*, 705 So. 2d at 325 ("Holland argues that our caselaw requires the trial court to permit his presentation of evidence on whimsical or residual doubt. Our caselaw has prohibited counsel from doing more than asserting whimsical doubt at closing argument."). Justice O'Connor directly addressed that issue in her concurring opinion in *Franklin*:

> Petitioner's "residual doubt" claim is that the States must permit capital sentencing bodies to demand proof of guilt to "an absolute certainty" before imposing the death sentence. Nothing in our cases mandates the imposition of this heightened burden of proof at capital sentencing.

Franklin, 487 U.S. at 188. Those who advocate consideration of residual doubt recognize that it would raise the State's burden. *See, e.g.*, Treadway, Note: *"Residual Doubt" in Capital Sentencing: No Doubt it Is an Appropriate Mitigating Factor*, 43 Case W. Res. L. Rev. 215 (1992). While it may be an appropriate matter for discussion among policy makers, nothing in this Court's jurisprudence suggests that the Eighth Amendment requires this heightened burden on the State.

Whether offered as proof of innocence or as a basis to argue that residual doubt about guilt mitigates against imposition of the death penalty, the Oregon Supreme Court's holding is inconsistent with this Court's case law addressing the Eighth Amendment mitigation requirements and defining what circumstances of the offense must be considered in mitigation. Viewed in context of the reason for the Eighth Amendment mitigation requirement, "circumstances of the offense" must be limited to evidence that aids the jury in making the individualized assessment of the defendant's moral culpability and whether the defendant should receive the death penalty. Requiring that the jury revisit arguments about the defendant's legal culpability does not aid the jury in carrying out its duties in the selection phase of a capital sentencing proceeding.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Oregon Supreme Court.

Respectfully submitted,

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
MARY H. WILLIAMS
Solicitor General
Counsel for Petitioner
State of Oregon

July 22, 2005

Or. Rev. Stat. § 135.455

(1) If the defendant in a criminal action proposes to rely in any way on alibi evidence, the defendant shall, not less than five days before the trial of the cause, file and serve upon the district attorney a written notice of the purpose to offer such evidence, which notice shall state specifically the place or places where the defendant claims to have been at the time or times of the alleged offense together with the name and residence or business address of each witness upon whom the defendant intends to rely for alibi evidence. If the defendant fails to file and serve such notice, the defendant shall not be permitted to introduce alibi evidence at the trial of the cause unless the court for good cause orders otherwise.

(2) As used in this section "alibi evidence" means evidence that the defendant in a criminal action was, at the time of commission of the alleged offense, at a place other than the place where such offense was committed.

Or. Rev. Stat. § 136.535

Except that a new trial may not be granted on application of the state, ORS 19.430 and ORCP 64 A, B and D to G apply to and regulate new trials in criminal actions.

Or. Rev. Stat. § 163.150

(1)(a) Upon a finding that the defendant is guilty of aggravated murder, the court, except as otherwise provided in subsection (3) of this section, shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to life imprisonment, as described in ORS 163.105(1)(c), life imprisonment without the possibility of release or parole, as described in ORS 163.105(1)(b), or death. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. If a juror for any

reason is unable to perform the function of a juror, the juror shall be dismissed from the sentencing proceeding. The court shall cause to be drawn the name of one of the alternate jurors, who shall then become a member of the jury for the sentencing proceeding notwithstanding the fact that the alternate juror did not deliberate on the issue of guilt. The substitution of an alternate juror shall be allowed only if the jury has not begun to deliberate on the issue of the sentence. If the defendant has pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence including, but not limited to, victim impact evidence relating to the personal characteristics of the victim or the impact of the crime on the victim's family and any aggravating or mitigating evidence relevant to the issue in paragraph (b)(D) of this subsection; however, neither the state nor the defendant shall be allowed to introduce repetitive evidence that has previously been offered and received during the trial on the issue of guilt. The court shall instruct the jury that all evidence previously offered and received may be considered for purposes of the sentencing hearing. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Oregon. The state and the defendant shall be permitted to present arguments for or against a sentence of death and for or against a sentence of life imprisonment with or without the possibility of release or parole.

(b) Upon the conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(A) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death of the deceased or another would result;

(B) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;

(C) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased; and

(D) Whether the defendant should receive a death sentence.

(c)(A) The court shall instruct the jury to consider, in determining the issues in paragraph (b) of this subsection [the four questions the jury must answer], any mitigating circumstances offered in evidence, including but not limited to the defendant's age, the extent and severity of the defendant's prior criminal conduct and the extent of the mental and emotional pressure under which the defendant was acting at the time the offense was committed.

(B) The court shall instruct the jury to answer the question in paragraph (b)(D) of this subsection "no" if, after considering any aggravating evidence and any mitigating evidence concerning any aspect of the defendant's character or background, or any circumstances of the offense and any victim impact evidence as described in paragraph (a) of this subsection, one or more of the jurors believe that the defendant should not receive a death sentence.

(d) The state must prove each issue submitted under paragraph (b)(A) to (C) of this subsection beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue considered.

(e) The court shall charge the jury that it may not answer any issue "yes," under paragraph (b) of this subsection unless it agrees unanimously.

(f) If the jury returns an affirmative finding on each issue considered under paragraph (b) of this subsection, the trial judge shall sentence the defendant to death.

(2)(a) Upon the conclusion of the presentation of the evidence, the court shall also instruct the jury that if it reaches a negative finding on any issue under subsection (1)(b) of this section, the trial court shall sentence the defendant to life imprisonment without the possibility of release or parole, as described in ORS 163.105(1)(b), unless 10 or more members of the jury further find that there are sufficient mitigating circumstances to warrant life imprisonment, in which case the trial court shall sentence the defendant to life imprisonment as described in ORS 163.105(1)(c).

(b) If the jury returns a negative finding on any issue under subsection (1)(b) of this section and further finds that there are sufficient mitigating circumstances to warrant life imprisonment, the trial court shall sentence the defendant to life imprisonment in the custody of the Department of Corrections as provided in ORS 163.105(1)(c).

(3)(a) When the defendant is found guilty of aggravated murder, and ORS 137.707(2) applies or the state advises the court on the record that the state declines to present evidence for purposes of sentencing the defendant to death, the court:

(A) Shall not conduct a sentencing proceeding as described in subsection (1) of this section, and a sentence of death shall not be ordered.

(B) Shall conduct a sentencing proceeding to determine whether the defendant shall be sentenced to life imprisonment without the possibility of release or parole as described in ORS 163.105(1)(b) or life im-

prisonment as described in ORS 163.105(1)(c). If the defendant waives all rights to a jury sentencing proceeding, the court shall conduct the sentencing proceeding as the trier of fact. The procedure for the sentencing proceeding, whether before a court or a jury shall follow the procedure of subsection (1)(a) of this section, as modified by this subsection.

(b) Following the presentation of evidence and argument under paragraph (a) of this subsection, the court shall instruct the jury that the trial court shall sentence the defendant to life imprisonment without the possibility of release or parole as described in ORS 163.105(1)(b), unless after considering all of the evidence submitted, 10 or more members of the jury find there are sufficient mitigating circumstances to warrant life imprisonment with the possibility of parole as described in ORS 163.105(1)(c). If 10 or more members of the jury find there are sufficient mitigating circumstances to warrant life imprisonment with the possibility of parole, the trial court shall sentence the defendant to life imprisonment as described in ORS 163.105(1)(c).

(c) Nothing in this subsection shall preclude the court from sentencing the defendant to life imprisonment, as described in ORS 163.105(1)(c), or life imprisonment without the possibility of release or parole, as described in ORS 163.105(1)(b), pursuant to a stipulation of sentence or stipulation of sentencing facts agreed to and offered by both parties if the defendant waives all rights to a jury sentencing proceeding.

(4) If any part of subsection (2) of this section is held invalid and as a result thereof a defendant who has been sentenced to life imprisonment without possibility of release or parole will instead be sentenced to life imprisonment in the custody of the Department of Corrections as

provided in ORS 163.105(2), the defendant shall be confined for a minimum of 30 years without possibility of parole, release on work release or any form of temporary leave or employment at a forest or work camp. Subsection (2) of this section shall apply only to trials commencing on or after July 19, 1989.

(5) Notwithstanding subsection (1)(a) of this section, if the trial court grants a mistrial during the sentencing proceeding, the trial court, at the election of the state, shall either:

(a) Sentence the defendant to imprisonment for life in the custody of the Department of Corrections as provided in ORS 163.105(1)(c); or

(b) Impanel a new sentencing jury for the purpose of conducting a new sentencing proceeding to determine if the defendant should be sentenced to:

(A) Death;

(B) Imprisonment for life without the possibility of release or parole as provided in ORS 163.105(1)(b); or

(C) Imprisonment for life in the custody of the Department of Corrections as provided in ORS 163.105(1)(c).

Or. Rule Civ. Proc. 64

A. A new trial is a reexamination of an issue of fact in the same court after judgment.

B. A former judgment may be set aside and a new trial granted in an action where there has been a trial by jury on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:

B(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of dis-

cretion, by which such party was prevented from having fair trial.

B(2) Misconduct of the jury or prevailing party.

B(3) Accident or surprise which ordinary prudence could not have guarded against.

B(4) Newly discovered evidence, material for the party making the application, which such party could not with reasonable diligence have discovered and produced at the trial.

B(5) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

B(6) Error in law occurring at the trial and objected to or excepted to by the party making the application.

*****